

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, May 7, 2015
9:22 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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On Behalf of the Defendant

P R O C E E D I N G S

THE COURT: It was your suggestion, I think?

MR. BRUCK: Yes, it was. Thank you for seeing us back here.

The defense moves for a mistrial in light of a number of events that occurred during the cross-examination so far of Mark Bezy, and I would like to go through them one by one.

Overall, we think that the government has created a false and extremely false and extremely prejudicial misimpression about what will happen to the defendant after conviction, and I'd like to -- in addition, the cross-examination injected the impermissible topic of cost in quite emphatic terms. Mr. Mellin stated that it was incredibly costly for the Department of Justice or BOP to have their individuals, employees --

"Objection.

"THE COURT: No, you may have it."

That's at page 42 of the transcript of Mr. Bezy yesterday. So that's the first.

MR. WEINREB: Can we have the record reflect what the answer was to the question?

MR. BRUCK: The answer was, "I'll rephrase" --

"You may have it.

"I'll rephrase it."

And then it worked through into the purpose of the

1 stepdown.

2 "Objection.

3 "Sustained. I think the point has been made."

4 So in context, the Court apparently felt that the
5 exchange had already made the point of the costliness of
6 this -- of keeping somebody at ADX, or keeping somebody in H
7 Unit under the SAMs.

8 MR. WEINREB: I think, your Honor, the record will
9 speak for itself about what was said in the courtroom, but the
10 record should not reflect that the Court believed the point was
11 made. The objection was sustained and there was no answer to
12 the question.

13 MR. MELLIN: Your Honor, just so the record is clear,
14 that didn't have to do with the cost of the incarceration of
15 the defendant, it had to do with the reasons why there is a
16 stepdown process in place and why Mr. Bezy was involved in the
17 stepdown process.

18 MR. BRUCK: The record will speak for itself.

19 Secondly, the cross-examination referred to -- and I
20 quote. The question is, "the U.S. Attorney's Office may think
21 they want to have a SAMs in place, but the Department of
22 Justice overall may make a call and say no, correct?

23 "ANSWER: It's possible.

24 "That's happened repeatedly, correct?

25 "It's very possible."

1 Based on that, last night we submitted a discovery
2 request to the government to ask for examples of such an event
3 where a SAMs had been requested in a terrorist case by the
4 investigating agency and the prosecuting agency and had been
5 overruled by the attorney general, either -- as to a renewal,
6 and have received no response. We think this creates a
7 misleading impression that this is something which is plausible
8 and that is likely to happen in this case, or even reasonably
9 foreseeable to happen in this case.

10 This is a misleading impression. If the government
11 has evidence to support that line of cross-examination, they
12 should produce it. And if they don't, the Court should
13 instruct the jury -- well, we don't think the bell can be
14 unrung, that's why we're moving for a mistrial. But in any
15 event, the damage, if it could be repaired, it should be.

16 The third, the defense -- the cross-examination moved
17 in a very unfair and misleading way, questioned Mr. Bezy about
18 the fact that the defense had moved to lift the SAMs. The
19 context in which that occurred was completely different than
20 what we are litigating here. That was a pretrial SAMs that was
21 applied on the basis of virtually no evidence of misconduct by
22 the defendant. And the thrust of all of the litigation around
23 the SAMs pretrial had to do with limitations on the defense
24 effort, all of which is moot for someone under sentence. But
25 the jury doesn't know any of that.

1 It is also the case that no court has ever ordered the
2 government to lift or fail to renew a SAMs. There has been
3 litigation over particular people on a visiting list or details
4 of the communications restrictions, and so far as we're
5 aware -- and we've also asked the government to provide us with
6 citations and have received nothing. So far as we're aware,
7 even on these minor requests -- judicial requests for judicial
8 modification, there has been no relief ever granted in any
9 case. The closest that has ever come is that a court remanded
10 the matter to the FBI to reconsider a limitation on
11 communication involving particular correspondence.

12 So the misleading impression has been given that this
13 is a very porous system, that the government is not, in fact,
14 under control who is placed under SAMs, who goes to H Unit, who
15 stays there. If this were true, then we would have to take our
16 lumps, but it is not true. It's a false impression and it's
17 being done in multiple ways.

18 And the implied attack on the defense was particularly
19 prejudicial because it appeared to undermine our credibility
20 and forthrightness when, in fact, our challenges to the SAMs,
21 which were never actually ruled on, let alone denied -- we
22 never got to that. The government voluntarily made some
23 modifications that had to do with the defense function, and
24 that was that. But the impression the jury has been left with
25 is that this is a matter that we bring to the attention of the

1 Court, and for all they know the Court may have done whatever
2 and overruled the government. It is just not fair and it's not
3 fair because it's false. And it's also false in a peculiarly
4 prejudicial way because it is intended to make liars out of us,
5 that we are pointing to this procedure postconviction and here
6 we are moving to strike the SAMs, and it suggests as though --
7 you know, it creates the impression that we're talking out of
8 both sides of our mouth, and it's not true. We're talking
9 about apples and oranges in this litigation.

10 I don't know how this can be fixed. It is a critical
11 issue. You can tell by the way the government behaved
12 yesterday that they think it's a critical issue. They may
13 think it's more critical than we do, and we think it's very,
14 very serious.

15 So we think this is an appropriate grounds for
16 mistrial overall. We've given three specific examples, but
17 overall we think this cannot be limited to just these three
18 examples. The government is working to create a false
19 impression about what will happen to this young man when he is
20 sent out here under a life sentence. If he is, he's going to
21 ADX. The government now concedes that. And he will stay
22 there. And to create this impression that there are a million
23 casual ways in which the government could forget about him,
24 that the attorney general will overrule the local U.S.
25 Attorney's Office, that the U.S. Attorney's Office won't

1 remember to get the SAMs renewed, that the defense can
2 challenge it in court, that it is too costly, all of this
3 is -- bears no relation to what's actually likely to happen in
4 this case, and it just isn't fair.

5 So we move for a mistrial on these grounds.

6 THE COURT: Mr. Weinreb?

7 MR. WEINREB: I'll start with the cost issue. The
8 government does not dispute -- the government agrees that the
9 jury should not take into consideration the cost of
10 incarcerating the defendant as an alternative to the death
11 penalty, but that was not what the nature of the questioning
12 was about.

13 Mr. Bruck has decided to make an argument to the jury,
14 to offer evidence to the jury that if the defendant is put
15 in -- is sentenced to life imprisonment, he will be under
16 certain restrictive conditions. He'll go to ADX Florence, he
17 will be put in H Unit and he will remain there for the rest of
18 his life.

19 The reality is that he will likely be stepped down at
20 some point over time. And it was fair to ask their expert
21 whether the Department of -- the Bureau of Prisons tries their
22 best to step people down and to ask them why they try to do
23 that.

24 That was all that questioning was about. So there was
25 no effort or intent to suggest to the jury that should be

1 making their decision based on the cost of incarcerating him;
2 only to suggest that the Bureau of Prisons would itself try to
3 step him down if it could because they have -- and to explain
4 why they try to do that. They don't do it out of the kindness
5 of their heart, they do it because they have an incentive to do
6 it.

7 In addition, the questions really never got anywhere
8 because the defense made an objection. Although the Court
9 overruled it, the witness by that point seemed to have
10 forgotten the question. It was rephrased, asked another way.
11 There was an objection, it was sustained, so no answer was
12 given. And the defense -- the jury has been repeatedly told by
13 the Court that the questions are not evidence, only the answers
14 are evidence.

15 So all in all, I can see why Mr. Bruck would want to
16 seize on this issue given that it's one of the clear-cut areas
17 where you're not supposed to argue about something to a jury,
18 but in this case it's a tempest in a teapot because it didn't
19 happen.

20 Also, we were handed a proposed requested penalty
21 phase instruction by the defense to instruct the jury not to
22 speculate about the cost of incarceration or to take that into
23 consideration. Although we believe no error occurred in this
24 case and the instruction is not necessary, it is a fair
25 statement of the law. We don't object to it.

1 When it comes to the jurors' potential
2 misunderstanding of the SAMs, first of all, we dispute many of
3 the factual assertions that the -- it's unclear whether they're
4 really factual assertions or legal assertions that Mr. Bruck
5 has made today in this lobby conference about how the SAMs
6 process works, and this is really an illustration of why this
7 is a problem of the defense's own making.

8 The manner in which SAMs are obtained, are imposed,
9 are reviewed, are modified, are abandoned is largely a matter
10 of law. It's really not an appropriate matter for a witness to
11 be testifying about because it's not a factual matter. And yet
12 the defense chose to call an expert to instruct the jury about
13 it and, unfortunately, they chose an expert who really doesn't
14 know what he's talking about. This is not a person who has
15 ever been involved in SAMs, who really has any expertise about
16 them. He basically just studied up on them to give his
17 testimony here, and he really doesn't know much what he's
18 talking about, whereas Mr. Mellin and the rest of us on this
19 team have a lot of experience with SAMs. We know just how the
20 process works, and there was a good-faith basis for every
21 single question that Mr. Mellin asked of this witness.

22 The truth is that it was Mr. Bruck who created an
23 extremely misleading picture of how the SAMs process works by
24 suggesting to the jury that it is essentially just entirely up
25 to DOJ to decide whether a SAMs is in place and whether it's in

1 place year after year forever. The truth is that there are
2 regulations that have the force of law that govern whether a
3 SAMs can be imposed or not. The U.S. Attorney's Office has to
4 follow them, the FBI has to follow them, the attorney general
5 has to follow them. And if he doesn't follow them, there's
6 judicial review, as there is any time the executive branch
7 violates something that has been -- that has the force of law.

8 When I say it has the force of law, I mean there are
9 regulations that were enacted by an administrative agency
10 that -- or in some case, pursuant to an authorizing statute.
11 They're just like any other regulation in the C.F.R. They
12 can't simply be ignored at will.

13 The fact is that SAMs are very frequently not renewed
14 and are abandoned because the factual -- the basis -- the
15 requirements for keeping them in place no longer exist or the
16 government no longer believes that it can prove the existence
17 of it by the necessary standard to a court. A good example,
18 although I don't know that any are needed, would be the Richard
19 Reid case. I'm just familiar with it because it was prosecuted
20 by the U.S. Attorney's Office in Boston.

21 Richard Reid was in Florence at ADX in H Unit under
22 SAMs, but eventually those had to be -- for one thing, those
23 were overseen by Judge Young who ordered changes to them, and
24 eventually those SAMs had to be relieved. And he's -- Richard
25 Reid, you know, a convicted terrorist, tried to murder many,

1 many people, has been stepped down and is in the general
2 population, as Ms. Conrad who was the attorney on that case,
3 knows well.

4 MS. CONRAD: I'm not any longer the attorney in that
5 case and I'm not aware of that because Judge Young struck our
6 representation at the request of the U.S. Attorney.

7 MR. WEINREB: She was the attorney in the case.

8 In any event, there is SAMs litigation ongoing in
9 Colorado right now. It's absolutely a false impression to
10 suggest that the judicial branch exercises no oversight over
11 the SAMs process, that the government can do things at will.
12 And the reality of the SAMs process is that the U.S. Attorney's
13 Office and the FBI, when they submit their recommendations to
14 the Department of Justice or to the parts of the Department of
15 Justice that review them, sometimes get feedback saying, This
16 isn't not going to -- this isn't sufficient
17 under -- it's -- they are the guardians of the SAMs process.
18 It's their job to review whether the facts exist, just like the
19 OEO, the Office of Executive Operations in the Department of
20 Justice reviews Title III wiretap applications and will not
21 allow the government to submit them to a judge if it believes
22 that the probable cause plus standard has not been met.

23 It's the same thing with the -- part of the Department
24 of Justice that reviews FISA warrant applications. They
25 exercise a very, very high standard of review and no warrant is

1 even given to the FISA court unless it is certain that it has
2 sufficient basis to be granted. And that's true with the SAMs
3 also, and that's why SAMs don't get granted.

4 So it's creating a completely false impression to say
5 that if the U.S. Attorney's Office or the FBI wants it, they
6 get it, and that the proof of that is that they never get
7 turned down. Well, we do get turned down, but it's done in an
8 internal process, in a way in which you don't have a judicial
9 record of it. So, again, it is Mr. Bruck, I think, who has
10 been creating the misleading impression in front of the jury.

11 And one of the big problems is that he is trying to
12 put on evidence of a process that takes place outside of his
13 sight, outside of Mr. Bezy's sight, outside of a lot of
14 people's sight through an expert witness who knows nothing,
15 really, or very little about what he's talking about.

16 So it's not fair for the defense to put on a one-sided
17 self-serving presentation of the evidence and try to block the
18 government from challenging it. If they put a witness up
19 there, we're entitled to cross-examine him. If we ask him a
20 question and he says, "Possibly. I don't know," that's the
21 witness he put up there. That's the answer they get. If they
22 wanted a different answer, they should have prepared him better
23 or have the facts be different, but they're not.

24 Excuse me one second.

25 (Counsel confer off the record.)

1 MR. WEINREB: I think that it is perfectly fair for
2 the jury to hear that in this case the defense moved to modify
3 the SAMs pretrial. They claim that -- because one of the
4 things that they argued in their motion was that SAMs are
5 subject to review pursuant to the constitution and pursuant to
6 the laws of the United States; in other words, it's not a
7 purely discretionary thing, again, with the Department of
8 Justice, that we just decide we want it and we get it, and the
9 only way it goes away is if we decide we don't want it.

10 This is a perfect example for the jury to see, that,
11 no, it is possible to go into a court, to tell a judge that the
12 U.S. Attorney's Office, the FBI, the Department of Justice in
13 seeking a particular restriction under a SAMs is violating the
14 Constitution, is violating the law in getting a judge to order
15 the office to do it differently. And they're entitled to hear
16 what often happens in situations like that is you don't
17 necessarily get a ruling from the court, but you get a
18 compromise. The parties work it out. They modify things.
19 Because that happens all the time.

20 So again, you know, it's not fair for the defense to
21 come up here and say, you know, The mitigation phase allows us
22 to put all sorts of information in front of the jury. Whatever
23 might seem to be mitigating. But we get to put in a one-sided,
24 uncross-examined, unchallenged version of it. We get to put in
25 the information. You have to sit silent. That's simply not

1 the law and that would not be appropriate. The jury needs to
2 make a quality sentencing decision here. They need to have all
3 the information in front of them.

4 MR. MELLIN: Your Honor, can I make one additional
5 point, which is that the defense has changed course in the way
6 in which they wanted to present this evidence. They submitted
7 a Touhy request, the government responded and identified three
8 witnesses that could talk about either ADX or SAMs or how they
9 are implemented, how someone is designated to ADX, what happens
10 if they are designated to ADX on SAMs.

11 We provided those witnesses. The defense was given
12 multiple opportunities to talk to those witnesses. That was
13 something we voluntarily allowed to happen. There was a time
14 where Mr. Bruck was on a conference call with the three
15 witnesses; there's another time just recently on Tuesday that
16 Mr. -- the defense was given another chance to sit down with
17 these witnesses and talk to them. It's at that point that Mr.
18 Bezy sat in on these interviews of Ms. Nicolet and -- as well
19 as Warden Oliver and David Schiavone.

20 Mr. Bezy then is now being called to regurgitate what
21 those witnesses said and put a certain spin on it even though
22 Mr. Bezy is not an expert in SAMs, and Mr. Bezy has had very
23 little, if any, involvement in the SAMs implementation during
24 his career with BOP. So what the defense is trying to do is
25 trying to use their witness to put a spin on what the

1 government's witnesses would have said if the defense had
2 called them, and it's, frankly, not appropriate.

3 MR. BRUCK: Well, to clarify the history of that, we
4 subpoenaed a witness from ADX of our choosing. The government
5 did nothing for three months, or four, and finally responded
6 that we could not have that witness but that the government had
7 chosen three other witnesses who would be our witnesses.

8 We went through the process of conferring with them,
9 preparing -- trying to prepare their testimony, and came to the
10 conclusion that the fairest way of presenting our case, not the
11 government's case, would be to call our own witness and not to
12 call the witnesses that the government had directed us to call
13 instead of the BOP official that we wanted. So I think the
14 record should reflect that it didn't exactly -- Mr. Mellin's
15 recounting is not the whole story.

16 THE COURT: Okay. Well, the motion for a mistrial is
17 denied. As to the cost issue, I substantially agree with what
18 Mr. Weinreb said about it. I understood it at the time to be
19 an explanation for the likelihood of step-down because it was a
20 motivation of the institution to do that, and that's, I suspect
21 without looking at the transcript myself -- that's the reason I
22 overruled the objection, was that it was -- it was not making
23 the point that was the forbidden one, that cost should be a
24 reason that you would opt against the death penalty; it was
25 making plausible why the prison custodians might lighten up on

1 prisoners, which is something that the jurors, as laypeople,
2 might think otherwise.

3 And as to the examination, I think most of what's
4 complained of is foreseeable consequence of opening up the area
5 which I think you were aware of. I do think that there were
6 places -- and I think it's partly because the exchange between
7 Mr. Mellin and Mr. Bezy got a little excited at times. I do
8 think there are some areas where misimpressions were left
9 plausibly with the jury. One is the one you've identified
10 about whether SAMs have been relieved in the universe of cases
11 or in the relevant subset of cases that may be present here,
12 and the other -- there was another example that occurs to me
13 right on the spot. There was a discussion about people in
14 general population coming out of their cells at 6 a.m. and
15 doing programs, and so on and so forth. And I understood that
16 as referring to a USP and not to ADX, and that was not clear.

17 MR. BRUCK: Yes.

18 THE COURT: So there are some -- that, I think, is
19 correctible by -- actually, I think both of them are
20 correctible by redirect, but I am concerned because of the
21 nature of the examination that those errors could recur.
22 That's why I mention them.

23 MR. WEINREB: Could I just --

24 THE COURT: There was an oppositional tone I think
25 that wasn't constructive.

1 MR. WEINREB: Can I ask for clarification? When the
2 Court says there was an misimpression about SAMs being relieved
3 in the relevant universe of cases. What exactly is meant by
4 "relieved"?

5 THE COURT: Whatever -- again, I don't have the
6 transcript, but "repeatedly," I think was the word; that they
7 expire or are --

8 MR. WEINREB: "Relieved" could mean that they expire
9 and are not renewed --

10 THE COURT: Right.

11 MR. WEINREB: -- which does happen.

12 THE COURT: Again, I don't know what the words were in
13 the question, but there was an impression it's not an uncommon
14 event for SAMs initially imposed, later not to be continued.

15 MR. WEINREB: No, that's a very common event.

16 THE COURT: I know in the universe. But is it for --

17 MR. MELLIN: For terrorism.

18 THE COURT: Of these offenses?

19 MR. MELLIN: We had --

20 THE COURT: Okay. All right. Well, then maybe it's
21 not a misimpression.

22 MR. MELLIN: I would be happy to ask that question
23 again, your Honor, but I don't know that Mr. Bezy knows the
24 answer. He has been called as an expert on this, but when I
25 try to get the answer from him it's obvious he doesn't know the

1 answer to, that there are instances where a terrorism -- an
2 inmate convicted of a terrorism charge who had a SAMs,
3 ultimately the SAMs was not renewed.

4 THE COURT: All right. Well, that should be
5 clarified.

6 MR. WEINREB: Richard Reid is a perfect example.

7 MR. MELLIN: And John Walker Lindh.

8 MR. BRUCK: He has the date on that --

9 THE COURT: Well, that should be clarified.

10 MR. BRUCK: -- and we'll bring it out on redirect.

11 THE COURT: So there's no misimpression on it.

12 The other matter about the difference -- what general
13 population means in ADX is different from what it means in the
14 USP, I think the jury does not understand that.

15 All of that having been said, this is a touchy area,
16 obviously. The government has made some points, rather
17 forcefully, I think. I don't know how much more needs to be
18 done.

19 MR. WEINREB: Well, your Honor, before we leave the
20 topic entirely, the one area that I think is fair for the
21 government to get into, because Mr. Bruck has made such a point
22 of showing to the jury this image of ADX in a freezing cold,
23 snowy environment that looks like Siberia or the moon, that
24 prisoners inside the prison are kept comfortably warm, that
25 they have a bed with a blanket on it, that they're not freezing

1 in the cold like you might think looking at the outside of it,
2 and furthermore, that if people want to visit, it's not like
3 they have to travel to Siberia or the moon; that the prison is
4 located conveniently to an airport, that it's possible to get
5 there without too much trouble. I mean, those are things that
6 are -- that Mr. Bruck is clearly trying to suggest through that
7 particular picture. There are plenty of pictures of ADX that
8 don't show it in that kind of environment. Even the Court said
9 it looked like it was on the moon.

10 We know that we're being at least during this phase,
11 as opposed to rebuttal, limited to some degree in discussing
12 what the conditions of the prison are like inside, but at a
13 minimum, we should be able to respond to those that the defense
14 has fairly invited response to by putting in, again, a
15 one-sided self-serving portrait of what it is and trying to
16 require us to leave the jury with that instead of providing
17 them with relevant information that will enable them to make a
18 decision about whether they think this is an accurate picture
19 of it or not.

20 THE COURT: Well --

21 MR. BRUCK: This gets us back to TV?

22 MR. WEINREB: No, I didn't say anything about
23 television; I'm talking specifically about these issues that
24 are raised by that photo, the isolation --

25 THE COURT: I think isolation is a fair point. I'm

1 not sure physical description of the inside is raised by
2 the question.

3 MR. WEINREB: The only thing we're asking for is to
4 the extent that it looks like it is a freezing cold place
5 which -- you know, I mean, I think that a picture, you know,
6 tells -- is better than a thousand words. It creates an
7 impression, and that picture creates an impression that the
8 people there are like in Siberia, like in the movies you see
9 where the guards are walking around in, you know, huge coats
10 trying to keep themselves warm. It's nothing like that. This
11 is a very modern facility. It is well heated. There are --
12 you know, prisoners are kept comfortably warm.

13 THE COURT: You can do that and you can have the
14 airport testimony, but that's it. Okay. So can we --

15 MR. WEINREB: Sister Helen?

16 THE COURT: Can we move to the next issue?

17 MR. MELLIN: Your Honor, if I could just go over the
18 areas that I was planning on going over with Mr. Bezy?

19 THE COURT: Okay.

20 MR. MELLIN: I plan on discussing with him, number
21 one, the fact that he has a business where he goes around
22 testifying in all of these cases and the amount of income he
23 makes in these cases, the fact that he's always testified for
24 the defense, those types of questions. Going back to the fact
25 that he doesn't really have any personal knowledge of the SAMs

1 program, and what SAMs he ever worked on; how he became aware
2 of the information in this case; the fact that there were these
3 meetings, he sat in on those meetings; up to that point he
4 didn't even know that information, how he became aware of that
5 information; and how it was he turned around yesterday to
6 regurgitate it. And then to go into the communication, he left
7 the impression the defendant is only allowed one phone call --
8 only one 15-minute phone call under the SAMs, that's completely
9 incorrect. He has to be allowed one phone call, but he may be
10 permitted more phone calls.

11 MS. CONRAD: He said that.

12 MR. MELLIN: So I want to go into the communications,
13 I want to go into the social visits. He indicated and said
14 that it was just the immediate family. That isn't even true
15 for the SAMs in this case, and that can be modified, so I was
16 planning on going into that. The written communications, legal
17 visits, legal communications are unlimited, go into that a
18 little bit. Those are the areas I intend to go into.

19 MR. BRUCK: Now, as far as -- do you intend to
20 identify the visitors that have been allowed in this case in
21 pretrial status?

22 MR. MELLIN: I do not, as long as he does not push
23 back on there are people other than immediate family members.
24 Part of the problem, Mr. Bruck, is when I ask a question, he
25 doesn't give the appropriate response, and I think it's

1 probably because he doesn't know a lot about the SAMs and he
2 doesn't know a lot about the SAMs program, but that was a
3 decision you made in calling him.

4 MR. BRUCK: We would like to object to any reference
5 to the notion that the people he met with were our witnesses
6 because that is a misimpression. They are witnesses that were
7 designated by the government to be defense witnesses, not
8 witnesses that we chose. I think that is an area to be left
9 alone. If he met with BOP officials that you say has superior
10 knowledge, great, but not that they were defense witnesses that
11 we decided not to call.

12 THE COURT: Yes, I agree with that.

13 Okay. Can we move to the Sister Prejean question?
14 Can I have a proffer of what she would say?

15 MS. CONRAD: Sure. Well, there are interrelated
16 issues here between Sister Prejean and the statement of
17 remorse, but let me focus on Sister Prejean first of all
18 because with respect to the statement of remorse, I mean, if we
19 were permitted to elicit that, we would elicit that from her,
20 or certainly her opinion about whether he is remorseful. But
21 we also are prepared to narrow that if the Court rules against
22 us on this to essentially a character witness.

23 She has met with him, her impressions of him. The
24 fact, I think, just alone that a Catholic nun has established
25 what she will describe as an instant rapport with someone who

1 the government has painted as an extremist Muslim terrorist I
2 think is very telling, and I think the jury should be allowed
3 to hear that.

4 THE COURT: So tell me the details.

5 MS. CONRAD: So the details are that she was contacted
6 by -- she knows someone on the defense team. She was asked to
7 meet with him simply because --

8 THE COURT: When?

9 MS. CONRAD: In -- she first met with him in March.
10 Early March.

11 MR. WEINREB: Of this year?

12 MS. PELLEGRINI: Of this year?

13 MS. CONRAD: Of this year.

14 She is someone who works with prisoners, individuals
15 not just on death row but also people serving life in prison
16 who, as she puts it, accompanies them and essentially befriends
17 them, works with them, helps them come to terms with what they
18 have done. But not just that, but she works with them
19 sometimes for ten years, sometimes is present at the execution.
20 She essentially functions as a spiritual advisor --

21 THE COURT: With respect to this defendant, that's
22 what I'm interested in. How many times has she met with him?

23 MS. CONRAD: She's met with him five times.

24 THE COURT: And what's the nature of the testimony?

25 MS. CONRAD: To talk with him.

1 THE COURT: No, her testimony. What would she say?

2 MS. CONRAD: Her testimony is that I've met with him
3 five times, I have formed an impression of him that he is
4 someone who recognizes the sorrow and pain that he has caused,
5 that he deeply regrets it. Again, this is something that
6 depends on the scope of the Court's ruling. That he was open
7 to meeting with me. We discussed scripture. We discussed many
8 things. We discussed what his life would be like going
9 forward. We -- and that he is someone who she believes she can
10 work with in the future.

11 So if she's not allowed to testify about either her
12 opinion or about what he has said about remorse, then -- but I
13 certainly have an argument about why she should be allowed to,
14 then she could testify, essentially, as clergy, as a character
15 witness, who has gotten to know the defendant over the last few
16 months and sees in him human -- human qualities of dignity,
17 introspection and a possibility -- although she wouldn't use
18 that word and I wouldn't elicit it -- of redemption.

19 MR. WEINREB: That's not character testimony, your
20 Honor, as the Court knows. We object to this because every
21 single thing that she will say is based on things that the
22 defendant has said to her which she -- the jury will
23 necessarily be led to believe that he said things to her, words
24 of remorse, words of regret, words of reflection, words of
25 sorrow, and that she found them credible, that she personally

1 believes him. And so instead of him expressing those words to
2 the jury and allowing them to assess whether they believe them,
3 whether this is something just being said for -- to obtain a
4 benefit, whether it's sincere or insincere, how far it goes,
5 whether he still harbors jihadi beliefs, any number of things
6 that they would find out if they could see him testify under
7 oath subject to cross-examination, they will instead again hear
8 a one-sided self-serving presentation of what he had to say
9 filtered through this person who can't be cross-examined about
10 precisely what he said without getting into, you know, all
11 sorts of out-of-court statements.

12 And she will -- essentially by being a Catholic nun
13 will get up there and say, You know, I'm somebody who, if I
14 swear an oath to tell the truth, you know, clearly I would
15 never violate it. I'm a Catholic nun and you can believe what
16 I say. The imprimatur of her robes, or her habit, and her
17 celebrity, which inevitably will be brought up because it will
18 be necessary to bring it out to impeach her, will be a stamp of
19 sincerity or believability on everything that she says the
20 defendant said to her. It's just incredibly unreliable
21 information.

22 Of all the people to pick to give this character
23 testimony, you know, an internationally known anti-death
24 penalty woman of the cloth, and it's just -- again, it's
25 a -- it's an attempt by the defense to block the jury from

1 getting the full picture and to carefully filter exactly what
2 it is that they hear through the mouth of somebody who will
3 shield the defendant from having to really display who he is,
4 what he feels like, what his potential for redemption is.

5 She has absolutely no expertise to testify as an
6 expert. She's not qualified as an expert in anything. There's
7 no science of anything that she can testify about. She has no
8 better claim than anyone else to be able to detect things that
9 are as ineffable as remorse or the capacity for redemption.
10 She would essentially be -- there's no way that this could
11 avoid issues of the morality of the death penalty, of morality
12 in general, whether the Catholic church approves of the death
13 penalty or not.

14 Putting her on the witness stand necessarily injects
15 into the case all sorts of unreliable, inadmissible kinds of
16 evidence, things the jury should not be focused on. It's hard
17 enough for them to understand their task in this case, that
18 there are aggravating factors that have to be proved by a
19 certain quantum of evidence, mitigating factors, that they get
20 weighed. To, at the end of the whole process, inject this
21 wrath of irrelevant and distracting and misleading and
22 confusing issues, putting it all before them is not something
23 that the defense should be able to do, especially spring it on
24 us at this incredible late date.

25 I mean, if she testified -- the time for noticing

1 experts is eight months ago.

2 MS. CONRAD: She's not an expert; she's a lay witness.

3 MR. WEINREB: We were told she's going to give an
4 opinion about whether he was remorseful.

5 MS. CONRAD: A lay opinion.

6 MR. WEINREB: The time for noticing witnesses of any
7 kind was four months ago, especially celebrity witnesses. This
8 was the woman who wrote the book *Dead Man Walking* and then was
9 featured in it by a famous actor. This was a popular movie
10 that got nominated for four Academy Awards and won two of them.
11 Many of the jurors probably saw it and have an impression of
12 this woman based not on what they're going to see in the
13 courtroom but of their memories of Susan Sarandon who played
14 her in the movie.

15 And that movie was a fiction, and yet because she
16 wrote the book and then the movie was made about it, any juror
17 who sees, Oh, my God, this is the woman I saw in that movie,
18 that woman who I thought was so wonderful, was so believable,
19 was such a great woman who could see something that nobody else
20 could see, that this guy on death row who for years and years
21 and years denied that he had committed this murder and finally
22 came around under her tutelage to admit what he had done, to
23 accept it moments before his execution, that -- it is hard to
24 imagine anything more prejudicial than that.

25 If they wanted to call her, the time to notice it was

1 four-plus months ago and we could have asked the jurors if they
2 saw the movie, if they knew who she was, if they had memories
3 of the movie. It's just too late. She's the wrong person. It
4 shouldn't come in.

5 And to the extent that she testifies, gives character
6 testimony -- character testimony can be limited to -- based on
7 whether -- it is normally limited not to examples, not to have
8 spoken to him and I've seen his sorrow and pain. He deeply
9 regrets it. We discussed scripture. That's not character
10 testimony; that is just somebody talking about their
11 conversations with somebody and essentially channeling what he
12 said to her to the jury, shielding it from all forms of
13 scrutiny.

14 MS. CONRAD: May I respond? First of all, I don't
15 know if the government's objection -- it sounds like they're
16 saying no clergy can ever testify because their testimony would
17 carry too much weight. That can't possibly be true in the
18 penalty phase of a death penalty case -- of a capital case or
19 because she's famous.

20 Now, the jury has been exposed to all kinds of
21 information about this case and they have said that they
22 understand that they are to decide this case solely on what is
23 presented in court.

24 With respect to the late -- so-called late disclosure,
25 we provided notice of April 22nd, the day after the

1 government's opening statement in the penalty phase when we
2 first realized what the government was doing and where the
3 government was going with lack of remorse, when they displayed
4 over our objection the still from the cell block video.

5 Now, this leads to -- and I think this is important,
6 Judge -- to the larger question of how we rebut lack of
7 remorse. The government chose to identify lack of remorse as
8 an aggravating factor in this case. The government chose --
9 and this is what really prompted us to notice her as a witness.
10 We initially were not planning to call her as a witness. She
11 met with him and she will testify to this as part of her
12 ministry, to minister to people who have committed horrible
13 crimes and to help them on their journey.

14 But Ms. Pellegrini in her opening said the defendant
15 is unchanged. And that, your Honor, put us on the spot to try
16 to show that he has changed. When the government filed the
17 notice of lack of remorse as an aggravating factor, they had in
18 their hands the statement that we seek to introduce, 3249, the
19 handwritten statement of remorse. The government's position is
20 that we cannot -- the only --

21 MR. WEINREB: I prefer we move on to the statement. I
22 would just like to briefly respond to the points.

23 MS. CONRAD: I'm not moving on because I'm talking
24 about why this is --

25 THE COURT: So your analog is lay opinion, I gather?

1 MS. CONRAD: Correct.

2 THE COURT: Do you have any case law about this kind
3 of circumstance?

4 MS. CONRAD: Well, it's character. I mean,
5 character --

6 THE COURT: No, that's different from lay opinion.

7 MS. CONRAD: Character evidence is lay opinion. Do
8 you have an opinion of his character? That's lay opinion.

9 THE COURT: Well, in very limited circumstances. I
10 have to look at the rule. Usually it's reputational.

11 MS. CONRAD: No, in a guilt phase reputation for
12 honesty, but not in a penalty phase. In a penalty phase, what
13 could possibly be more relevant than the defendant's character?

14 THE COURT: Cases?

15 MS. CONRAD: I don't have them. Mr. Bruck may know
16 them but I can't imagine --

17 THE COURT: I'm just looking for some guidance, is
18 all. I mean, if someone who has considered this position
19 before, I would like to see it.

20 MS. CONRAD: I can actually give you one example which
21 comes from the government's motion in limine in which they
22 cited -- I believe it was *United States versus Lighty*, and
23 their citation of it was kind of misleading. First of all, it
24 was plain error review. In that case the defendant --

25 THE COURT: I've looked at that case.

1 MS. CONRAD: There they said it wasn't remorse because
2 it wasn't truly remorseful, it was character evidence and it
3 was cumulative of other character evidence. And I would note
4 that many of the cases the government cites on statements about
5 lack of -- about remorse are cases in which there were
6 precisely the type of unsworn statements that they object to in
7 this case and, therefore, an unsworn allocution to the jury
8 would be cumulative.

9 So the government to say that the only way a defendant
10 can ever confront an allegation of lack of remorse is by taking
11 the stand, first of all, would severely burden, obviously, the
12 Fifth Amendment privilege; and, second of all, is not supported
13 by the cases that they cite. And I can go into more of that as
14 far as the statement itself. But on the character, I think,
15 you know, *Lighty* talks about it, there certainly are many cases
16 in which clergy testify.

17 But we also have another challenge in this case, which
18 is the SAMs. So in order to show who -- what the defendant's
19 character is now, what the defendant's remorse is now, the
20 universe of people with whom he has had contact since this
21 crime is extremely limited.

22 THE COURT: Okay.

23 MS. CONRAD: Obviously we can't testify.

24 THE COURT: So let me ask you about the argument
25 concerning notice to the jury pool and, therefore, the

1 opportunity to voir dire about this rather notorious movie and
2 person.

3 MS. CONRAD: First of all, I don't plan to bring out
4 any reference to *Dead Man Walking*. I don't plan to bring out
5 any reference to the books that she's written. I don't plan to
6 focus on her fame or celebrity. The fact of the matter is she
7 is who she is. The government added people to the witness list
8 for the penalty phase such as Gary Oliveira who I don't believe
9 were ever on the witness --

10 MS. PELLEGRINI: He is. He was on the master list.

11 MS. CONRAD: Before voir dire?

12 MS. PELLEGRINI: Yes.

13 MR. WEINREB: We couldn't add anybody after voir dire
14 because of the statute.

15 MS. CONRAD: Well, there were a number of people added
16 and there were statutory objections that we raised that
17 we made --

18 MS. PELLEGRINI: With respect to Gary Oliveira, he was
19 there. He was on the list.

20 THE COURT: Okay.

21 MR. WEINREB: Your Honor, lack of remorse was
22 identified as a non-statutory aggravating factor I believe in
23 January of 2014. All Ms. Pellegrini said in her opening
24 statement was to -- all she did was to put up the photo of the
25 defendant giving the camera the finger and saying that as of

1 July of 2013, the defendant was unremorseful and unchanged.
2 She did not say that today he was unremorseful and unchanged,
3 that we were planning on putting on in our case-in-chief and so
4 it wasn't said. That was the evidence that we had of lack of
5 remorse, that's what we put in. That did not open the door to
6 all of this.

7 If the Court is looking for case law guidance, we
8 think the most appropriate cases to look at are the three
9 circuit court opinions stating that it's improper to allow
10 unsworn allocution, because the kind of so-called character
11 evidence -- that's just, you know, putting the wolf in sheep's
12 clothing. This is an attempt to put before the jury what the
13 defendant has said to Sister Prejean.

14 The only way she has any impression of him, the only
15 way she has any impression of his character, of any of the
16 things she's going to talk about are by talking to him and
17 believing the truth of what he is saying to her. So it is
18 essentially statements of remorse, statements of reflection,
19 statements of contrition being made to her. She is judging
20 them to be true and then she is presenting them to the jury in
21 the disguise of a character opinion. That is just a way of
22 putting in unsworn allocution and it should be barred for all
23 the reasons that those courts on whose cases we rely on
24 have -- and there are state court cases as well which we didn't
25 bother citing which held that unsworn allocations should be

1 barred.

2 MS. CONRAD: That's not what they say. They
3 say that --

4 MR. WEINREB: I'm not done.

5 As for Ms. Conrad's argument that these jurors said
6 that they wouldn't be affected by prior publicity about the
7 case, there were plenty of jurors who didn't say that and they
8 weren't allowed on the jury. These jurors were not asked a
9 different question, which was whether a very powerful and
10 moving film depiction of somebody is something that they could
11 put aside in hearing her testimony on the witness stand.

12 They also were not asked, and we would surely have
13 requested that they be asked it, especially the ones who are
14 Catholic on the jury, is whether they would treat the testimony
15 of a nun differently from the testimony of another witness
16 simply because she's a nun. I'm not saying that no one from
17 the clergy can ever testify, but we're entitled to jurors who
18 can judge all witnesses fair and impartially.

19 If they have a police uniform on, they're not entitled
20 to more credibility simply because of that. And if they wear a
21 nun's habit, they're not entitled to more credibility. They
22 weren't asked that, and I guarantee you that there would be
23 Catholics on that jury who potentially would not feel like it
24 was appropriate to disbelieve what a nun said even if, frankly,
25 they may believe that they could not. That is a very, very

1 powerful association for some people.

2 THE COURT: Okay.

3 MR. WEINREB: And then there's one other thing I would
4 like to point out which is that the fact that Ms. Conrad says
5 she's not going to elicit that this is a nun who wrote *Dead Man*
6 *Walking* and all of that, that's a specious kind of argument to
7 make because the government has to elicit that to show her
8 bias. We have no choice. How else are we going to get the
9 jury to doubt that this nun has any reason to say anything
10 other than the truth or that she has any reason to not filter
11 what she's hearing? She is a committed death penalty
12 abolitionist. She's made it her life work. She's given
13 hundreds, if not thousands, of speeches against it. The jury
14 needs to know that.

15 MS. CLARKE: Judge, I hate to weigh too much into this
16 but I have a little bit of history how she came to be involved
17 in our case. You know, this trial started in January and this
18 young man sat and watched the voir dire and he sat and realized
19 that he was -- you know, ultimately this trial was going
20 forward. And in my experience, and in this case, it's very
21 difficult for the accused, particularly someone that young, to
22 understand what they're going through.

23 So we had a connection to Helen Prejean and asked her
24 to come, you know, work with him and see if he could see a path
25 forward. I mean, you know, it's a very challenging time. And

1 I'm sure the Court's looked at him and watched him and, you
2 know, you see a kid struggling with connecting to what's going
3 on around him. So Helen Prejean did not come into this case to
4 be a witness; she came into this case to help us help him.

5 And when she connected so quickly with him -- she
6 would be the first to say that she doesn't always connect, that
7 there's not always remorse, that there's not always an
8 understanding of the depth of the harm someone has caused.
9 When she said that, you know, we thought, Oh, my goodness,
10 we've got the potential for remorse here. And then the
11 government came out swinging in opening in the penalty phase
12 that he was unchanged, unrepentant and uncaring. And that's
13 not the truth. And that's just not where we're at.

14 THE COURT: Let me move to a different question, and
15 that is the two exhibits. How would you propose -- or under
16 what authority would you propose those would be admissible?

17 MS. CONRAD: Well, your Honor, you know, again, the
18 government talks about this unsworn allocution. *Hall*, which is
19 sort of the major case on this, in *Hall* there actually -- it
20 was an unsworn allocution. And the cases talk about that there
21 is no right to an unsworn allocution, no First Circuit case on
22 point, an unsworn allocution to the jury by the defendant. In
23 *Hall* there was testimony, I believe by the sisters of the
24 defendant, about his remorse. There was no discussion in that
25 case about whether that's an unsworn allocution.

1 In *Lawrence* there was evidence introduced, a journal
2 entry. It's the same as the journal entry. In *Bolden* the
3 statement was excluded but there was other testimony regarding
4 remorse. The government's position is we can't offer any
5 evidence of remorse.

6 MR. WEINREB: That's not true.

7 MS. CONRAD: Other than live testimony from the
8 defendant on the witness the stand.

9 MR. WEINREB: Not true.

10 MS. CONRAD: Well, I don't know what other option the
11 government proposes if we're not allowed to offer a handwritten
12 statement by the defendant which the government has had in its
13 possession for a year and a half.

14 And so the only reason I provided the email was
15 because I thought the government wanted to -- us to put out --
16 or for the jury to know that this was in the context of a plea
17 discussion, and also essentially to authenticate that this was
18 provided to the government, that they received it, it was
19 accepted as a statement of the defendant.

20 It's in his handwriting, it's on his signature. There
21 are other examples of his handwriting in evidence. And the
22 government can certainly argue -- you have the statement,
23 he -- we -- it's not under oath, we don't have the opportunity
24 to cross-examine.

25 THE COURT: Well, that was the question I was going to

1 ask. Can the government call him?

2 MS. CONRAD: I'm sorry?

3 THE COURT: Could the government call him?

4 MS. CONRAD: No.

5 THE COURT: Why?

6 MS. CONRAD: Because he has a Fifth Amendment right
7 not to testify.

8 THE COURT: Once he's offered the testimony through
9 the exhibit.

10 MS. CONRAD: It's not testimony, it's a statement.
11 There is absolutely no case law that would say --

12 THE COURT: It's offered to the jury as a statement by
13 the defendant.

14 MS. CONRAD: And the government can --

15 THE COURT: And that doesn't open up the question?

16 MS. CONRAD: No, absolutely not.

17 MR. WEINREB: What if we went back into court and he
18 sat down and wrote the same note today and handed it up to
19 somebody to read on the witness stand?

20 MS. CONRAD: Well, then you could elicit that it was
21 just written today and, you know, and maybe there's even an
22 instruction -- and some of the cases suggest that with respect
23 to unsworn allocution -- I do want to point out there are
24 several courts that have allowed unsworn allocutions to the
25 jury, although I stand by the argument that that's not what

1 this is. One is *United States versus Chong*, which is District
2 Court of Hawaii, one is *United States versus Gabrion*, which is
3 the Western District of Michigan. I have the cases. Another
4 is *United States versus Whitten*. Now, *Whitten*, which is
5 Eastern District of New York, was reversed by the Second
6 Circuit because after the unsworn allocution the government in
7 the view of the Second Circuit improperly argued that the
8 defendant did not take the stand. I think the line was
9 something, well, like the path to the witness stand was never
10 blocked. So it seems to me that *Whitten*, which is
11 W-H-I-T-T-E-N -- I can provide the citation -- *Whitten* clearly
12 stands for the proposition that, A, it's permissible for a
13 district court to allow an unsworn allocution to the jury,
14 which is not what we're asking for; and second of all, that if
15 that happens, the government cannot say, But he chose not to
16 testify.

17 Now, you know, the case law on that is a little
18 unclear going forward in other circuits, perhaps. There's a
19 Supreme Court case that talks about an instruction, but if the
20 Court and the government were correct in the theory that if he
21 submits a statement -- in that case a live statement to the
22 jury, the government can then call him to the stand and
23 cross-examine him? I don't think *Whitten* would have
24 affirmed -- excuse me -- reversed for prosecutorial misconduct
25 in calling attention to his failure to testify.

1 You know, it's not just the unchanged, whatever, you
2 know, comment that Ms. Pellegrini said in her statement, it's
3 also the government cross-examining one of the relatives and
4 saying, Oh, but he is indifferent. He is indifferent to the
5 suffering of the victims in this case. The government wants
6 the jury to look at him as someone who is indifferent, who is
7 unremorseful to this day, and they want them to impose the
8 death penalty on that basis.

9 The cases the government cites are not cases in which
10 the government alleged lack of remorse. The government chose
11 to cite that as an aggravating factor. The government argued
12 it in their opening, the government opened the door. We have a
13 rebut -- right to rebut it, and I do not think that the
14 defendant can be required to testify in order to rebut it.

15 MS. PELLEGRINI: Then how could the government say to
16 the jury that we have no ability to cross-examine? It forces
17 us to make a choice of either skating so close to the line that
18 we're going into irreversible error -- I'm commenting on the
19 fact that he's not testifying -- or we get to say to the jury
20 that we weren't able to cross-examine him. It makes no sense.

21 MS. CONRAD: It's just like the 302s. The Court told
22 the jury that the 302s were statements that were not made under
23 oath and that the witness was not subject to cross-examination.

24 MS. PELLEGRINI: Those witnesses don't have the same
25 right.

1 THE COURT: All right. With respect to the two
2 documents, they're not admissible. I won't admit the two
3 documents. I want to reflect on the argument about the
4 witness.

5 If the witness were to testify, how long would it be?

6 MS. CONRAD: Not very long. Half-hour, maybe? Can I
7 just --

8 THE COURT: And if -- I just want to explore what's
9 happening here.

10 MS. CONRAD: Yeah.

11 THE COURT: If the witness is not permitted to
12 testify, is Bezy the last witness, then?

13 MR. BRUCK: Yes.

14 THE COURT: Okay. I'm partly thinking just of
15 logistics with the jury.

16 MS. CONRAD: May I just respond to one --

17 MS. CLARKE: We have some technical stuff to take care
18 of --

19 THE COURT: Yeah. No, there's a lot of stuff to take
20 care of.

21 MS. CONRAD: May I just respond to one point
22 Mr. Weinreb said that I don't understand because they don't
23 have any choice but to bring out the books she wrote and the
24 movie that she was in? I mean, they can certainly bring out
25 her anti-death penalty views for bias without going into movies

1 and books.

2 THE COURT: I understand his point.

3 So I think -- to be productive, I think we should go
4 and do Bezy, finish that, and then we'll probably take a break
5 and I'll look at a few things before I rule on the other
6 motion. So I don't know how much time it will be but at least
7 we'll get the jury doing something and then suspend again for
8 some necessary period of time.

9 (The proceedings adjourned at 10:20 a.m.)
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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 2/4/16